United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2169

TO BE ARGUED BY:
RALPH McMURRY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THOMAS PERRY,

Petitioner-Appellant,

-against-

LEON J. VINCENT, Superintendent,
Green Haven Correctional Facility,

Respondent-Appellee.

B
B/S

BRIEF FOR APPELLEE

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-
Appellee
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-4178

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

RALPH L. McMURRY
Assistant Attorney General
of Counsel

TABLE OF CASES

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

THOMAS PERRY, :

Petitioner-Appellant, :

-against- : 76-2169

LEON J. VINCENT, Superintendent, :
Green Haven Correctional Facility,

Respondent-Appellee. :

----------X

BRIEF FOR APPELLEE

Preliminary Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (Platt, J.), entered on October 14, 1976, denying petitioner's application for a writ of habeas corpus.

Facts

Petitioner was indicted in Queens County, New York for possession of a weapon as felony and menacing. Petitioner entered a plea of not guilty.

Proceeding of March 6, 1972

On March 6, 1972, petitioner's lawyer made application to withdraw his plea of not guilty and to enter a plea of guilty to attempted possession of a weapon as a felony in satisfaction of the indictment. The proffered plea came immediately after the trial court had denied a motion to suppress.*

The court proceeded to ask petitioner questions. In response to these questions, petitioner said he understood that (1) he could go to jail for years; (2) he, and not his lawyer, was the only person who could plead guilty; and (3) no promises were made by his lawyer or the court about his sentence. Petitioner then was asked to explain the factual circumstances of the crime. Under questioning petitioner admitted he knew the weapon was in his car but

---

* At this hearing a police testified that two men told him petitioner had pulled a "shiny silvery" gun on them at Kennedy Airport and drove away in a cab. The officer gave chase and pulled petitioner over. A .32 caliber revolver was found under the driver's seat.

denied that it was his weapon and denied knowing who put it there. At this point the trial interrupted the plea:

> THE DEFENDANT: Yes. I knew the revolver was there
>
> THE COURT: Did you put it there?
>
> THE DEFENDANT: No.
>
> THE COURT: Who put it there?
>
> THE DEFENDANT: I don't know.
>
> THE COURT: But you knew it was there?
>
> THE DEFENDANT: Yes.
>
> THE COURT: When did you find out that it was there, Perry?
>
> THE DEFENDANT: Your Honor, can I--
>
> THE COURT: Let me tell you something, Perry. We do not take any please from the innocent in this courtroom. If you are innocent of this charge, we are going to trial on the charge. If you want to plead guilty, then you have to tell me the facts that led up to the arrest. Now, from what you have told me now, you are innocent of these charges, and I won't take your plea. What do you want to do?
>
> THE DEFENDANT: Your Honor, can I say something? The weapon was put there. I know who put it there. It wasn't my weapon. That's what I am trying to tell you. That's why I plead guilty.

THE COURT: When did you know that the weapon was there?

THE DEFENDANT: Well, actually when I left the airport terminal.

THE COURT: Do you mean just before you were arrested?

THE DEFENDANT: Right.

THE COURT: The weapon was put there then?

THE DEFENDANT: Yes.

THE COURT: I won't take your plea, Mr. Mandel. You are playing games with the Court. I will not accept your plea. When do you want to go to trial, Mr. Mandel?

The plea was refused and the case set down for trial on March 13, 1972.

Proceeding of March 13, 1972

On March 13, 1972, petitioner's lawyer declared that he was ready to go to trial. However, counsel immediately moved to withdraw his client's not guilty plea and substitute therefor a plea of guilty to attempted possession of a weapon as a felony to cover the indictment.

The court proceeded to ask questions of petitioner. The court inquired into the factual circumstances of the crime, and petitioner admitted that the gun was his gun and that he had put the gun in his car. Petitioner said he understood that he could to to prison for four years; that only he and not his lawyer could plead guilty; and that no one had made promises to him regarding his sentence. The plea was accepted.

Sentence Proceeding of April 27, 1972

On April 27, 1972, petitioner was sentenced to four years in prison. Petitioner immediately attempted to withdraw his plea, without success.

POINT I

PETITIONER HAS FAILED TO EXHAUST STATE REMEDIES

This is still another case of a federal habeas petitioner attempting to have the federal courts pass on arguments not fully and squarely presented to the state courts.

In the original pro se petition for a writ of habeas corpus, petitioner raised one claim concerning his guilty plea.* Petitioner claimed his guilty plea was taken in violation of due process of law. Specifically petitioner argued that the trial court should not have summarily denied his motion to withdraw his guilty plea. "POINT ONE" of the brief reads as follows:

> "THE COURT BELOW SHOULD NOT HAVE SUMMARILY DENIED APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEA"

The subheading is followed by four pages of argument, presumably intended to support the argument contained in the subheading. A single paragraph of these four pages argues that "(m)oreover" the plea was involuntary under Boykin v. Alabama, 395 U.S. 238 (1969).**

---

* Petitioner also raised a Fourth Amendment claim. Such a claim is not raised here. Petitioner's pro se writ appears to be a copy of his Appellate Division brief, save that portion of his brief which argued that the sentence was too severe.

** A copy of the relevant pages are annexed hereto as Exhibit "A" so that this Court can determine for itself if there has been exhaustion. The brief is a total of twenty-five pages in length.

Clearly there is no exhaustion here. The Boykin argument made now in this Court was given to the state courts in a single paragraph of a four page discussion demonstrably intended to support another argument.* This is not a "fair" opportunity to consider a claim.

Only recently this Court had occasion to emphasize that a claim must first be fairly presented to the state courts. In Fielding v. LeFevre, ____F. 2d_____ (2d Cir. 1977) Slip Op. 1485, the court ruled that since the "thrust" of petitioner's claim in state court had been harshness of sentence, his federal claim that the sentence problem affected his right to a trial was not "substantially" the same and therefore had not been exhausted. Id. at 1491-1492. Respondents respectfully submit that a cursory mention of a point in a brief ostensibly designed to support one argument cannot constitute exhaustion for another argument.

* The State raised the exhaustion question below after counsel appeared and made Boykin the central argument in the case.

POINT II

PETITIONER'S GUILTY PLEA WAS VOLUNTARY

Petitioner claims his guilty plea was involuntary under Boykin, supra, because he was not told of the various constitutional rights he was waiving by entering his plea. This claim is without merit.

In ascertaining the voluntariness of a guilty plea, all the relevant surrounding circumstances must be considered. Brady v. United States, 397 U.S. 742, 749 (1970). This is exactly what the court below did.

As the District Court noted, petitioner was told four times that he might receive four years in jail. Petitioner was told four times that only he and not his lawyer could plead guilty. Petitioner was told that a guilty plea would not be taken from an innocent man, and that he could go to trial if he was innocent. Petitioner must have known he had a right to a trial since the case was set down for trial after his first aborted plea on March 6, 1972. The underlining factual circumstances of the crime were explored in detail.

Clearly this is not a Boykin case. In Boykin the record was completely silent as to the factual circumstances, the accused's background and his understanding of his rights. Here the record is substantial.

Other Circuits have ruled that Boykin does not require all the Boykin rights to be spread on the record in order to insure the voluntariness of a guilty plea. Wilkins v. Erickson, 505 F. 2d 761 (9th Cir. 1974); McChesney v. Henderson, 482 F. 2d 1101 (5th Cir. 1973), cert. den. 414 U.S. 1146; Wade v. Coiner, 468 F. 2d 1059 (4th Cir. 1972); Todd v. Lockhart, 490 F. 2d 626 (8th Cir. 1974). Even the Supreme Court has found a guilty plea valid wherein all the Boykin rights were not expressly enumerated. Brady v. United States, supra.

In Kloner v. United States, 535 F. 2d 730 (2d Cir. 1976), this Court recently upheld a federal guilty plea in circumstances similar to those in this case. In Kloner the defendant was advised of his right to a jury trial and of the maximum sentence. The District Court elicited assurances that the plea was voluntary and ascertained the factual basis of the plea. This Court found that

petitioner was aware of the alternative courses of action open to him and had not entered a plea through ignorance or misinformation. The same principles clearly apply to this case.

The District Court noted that the only significant difference between Kloner and this case is that here the court did not expressly warn petitioner of his right to trial by jury. However it is reasonable to conclude, for the reasons set forth by the District Court (Opinion 8), that petitioner was aware of this right. In any event, as noted above, the failure to make an explicit reference on the record to every Boykin right will not for that reason alone render the plea invalid.

In ascertaining the voluntariness of a plea, the rational motivations of a defendant who pleads guilty must be considered as well as the defendant's knowledge. North Carolina v. Alford, 400 U.S. 25 (1970); United States ex rel. Brown v. LaVallee, 424 F. 2d 457 (2d Cir. 1970), cert. den. 401 U.S. 942 (1971). Here it is plain that petitioner pleaded to a reduced charge in the face of a strong prosecution case in order to reduce his exposure

to punishment. This is demonstrated by the fact that petitioner changed his plea to guilty immediately after the motion to suppress was denied.

Petitioner relies heavily on this Court's decision in United States v. Journet, No. 76-1285, slip op. 371 (2d Cir. Nov. 1, 1976). That case is not controlling. Journet does not purport to state a constitutional rule; Journet simply holds that federal guilty pleas which do not comport with Rule 11 of the Federal Rules of Criminal Procedure must be invalidated. The court in Journet was concerned with fulfilling an express mandate of Congress made in its amendment of Rule 11 effective December 1, 1975. Id. Slip Op. 375. That the purpose of Congress may have been to codify the advice given in Boykin does not make the court's holding in Journet a constitutional one. Slip Op. 376. Significantly, the Supreme Court in its major interpretation of the requirements of Rule 11 made it clear that its holding was grounded in the exercise of its supervisory power over the federal courts and not on constitutional grounds. McCarthy v. United States, 394 U.S. 459, 464 (1969). Finally, it is plain that Rule 11 does not apply to state defendants.

Under all these circumstances petitioner's guilty plea was clearly voluntary under the applicable legal principles discussed above.

Assuming arguendo Journet states same constitutional rule applicable to state defendants, Journet is nonetheless inapplicable to this case since it was decided after the guilty plea in this case and after the decision of the District Court below. The applicable law should be that in effect at the time. In Kloner this Court in analyzing a 1971 guilty plea applied the traditional tests and never even mentioned the 1975 amendment to Rule 11. Petitioner made no mention of it in the District Court. Significantly the Supreme Court declined to make McCarthy, supra retroactive for reasons that are pertinent here. Halliday v. United States, 394 U.S. 831 (1969). To invalidate this 1972 state court plea because of its alleged failure to comport to a 1975 amendment to rules applicable to federal defendants would be travesty and would incidentally open up to collateral attack untold thousands of guilty pleas.

The traditional test for ascertaining the voluntariness of a plea is more than sufficient to achieve justice. Under this test the voluntariness of this plea is clear. Petitioner was represented by counsel; no complaint is made about him here. Petitioner knew the alternatives open to him. Petitioner knew the possible consequences of a plea. Petitioner admitted facts constituting the crime of possession of a weapon. Petitioner had rational reasons and motivations for pleading to a lesser charge. To upset this plea on this record would be triumph of form over substance.

Petitioner's real quarrel is with the sentence that was imposed. Petitioner was obviously upset by his prison sentence since he immediately moved to withdraw his plea. However this of course has no bearing on the voluntariness of his plea.

CONCLUSION

THE DECISION OF THE DISTRICT
COURT SHOULD BE AFFIRMED

Dated: New York, New York
February 7, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-
Appellee

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

RALPH L. McMURRY
Assistant Attorney General
of Counsel

Mr. Mandel: Your Honor, I'm just communicating to the Court what he says. If your Honor please, he wishes to know if he may withdraw his plea and go to trial.

The Court: Application is denied. The defendant is remanded.

(S 6-7).

ARGUMENT

POINT I

THE COURT BELOW SHOULD NOT HAVE SUMMARILY DENIED APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEA.

Appellant's motion for withdrawal of his guilty plea should not have been denied by the court below without an inquiry into the reasons for appellant's request. Where appellant had little criminal experience, was reluctant to plead guilty at first, and even when he did plead, it cannot be said to be voluntary in view of his unawareness of his rights; it would be appropriate for this Court to remand the case for a hearing on appellant's motion.

It is now well established that when a defendant makes a motion to withdraw his guilty plea, the court should make inquiries as to the reasons underlying the request. See People v. Beasley, 25 N.Y. 2d 483 (1969); People v. Nixon, 21 N.Y. 2d 338 (1967). Only recently the Court of Appeals has reaffirmed its preference for a hearing on a motion to

withdraw a guilty plea where at sentencing a defendant has asserted his innocence. As the Court noted, such a hearing would allow the trial court to make an "informed determination in accordance with the principles laid down in Nixon." People v. McClain, 32 N.Y. 2d 697 (1973); see also, People v. Terry, ____ A. D. 2d ____ (2nd Dept., N.Y.L.J., October 18, 1973, p. 19, cols. 3-4).

Appellant, while having some minor involvement with the law in 1961-62, cannot be characterized as a man with considerable experience and knowledge about the criminal system. Clearly, he didn't completely understand the nature and severe consequences of his plea until after his sentence had been imposed.

The record in the instant case demonstrates a marked hesitancy on the part of appellant to plead guilty. The first plea was not accepted by the court since appellant refused to admit that the gun was his, a denial which corroborated his statement to the police at the time of the crime. Moreover, the second plea, where appellant admitted possession, had all the earmarks of a rehearsed one. His rather perfunctory responses to some of the questions posed by the court can only be viewed in light of his first experience.

He had certainly learned that in order to have his plea accepted he would have to provide the appropriate answers. And, even then he continued to deny the menacing charge.

Seen in this light, it is not surprising that appellant requested to withdraw his plea when he heard the court mention the unrelated shooting incident between two cab drivers at the airport. Believing that he was to be punished for a crime which he steadfastly denied, i.e. the menacing charge, he may well have decided to stand trial.* As the record indicates, appellant may have entered a plea for other reasons than his guilt. A person who confesses his guilt to a lesser charge, not because he is guilty, but in hopes of avoiding punishment for crimes he did not commit, may reasonably decide to withdraw that plea when he believes the advantage gained therefrom is illusory.

Moreover, appellant's second plea cannot be said to have been knowingly and voluntarily entered. After all, he was never told of the important constitutional rights he was waiving. In fact he never was told of these rights

---

* At trial, appellant could have interposed a defense. The indictment charged him with possession "not in his home or place of business." A recent lower court decision has held that a "gypsy cab" is a place of business for purposes of the weapons possession sections of the Penal Law. People v. Anderson, N.Y.L.J., Feb. 26, 1973, p. 16, col. 8, (Crim. Ct. Bx. Co.). Appellant may not have been aware of this defense when he agreed to plead.

at the first plea either. The court never questioned appellant on his understanding of his right to a jury trial, his privilege to remain silent, his right to confront his accusers, and his right to be convicted beyond a reasonable doubt.* Therefore, the requirements of Boykin v. Alabama, 359 U.S. 238 (1969) were not met. See also, People v. Griffith, ____ A.D. 2d____ (1st Dept. 1973). In Boykin, the Supreme Court held the importance of these rights to be so paramount to a criminal defendant that there should be an affirmative demonstration on the record that a defendant has knowingly and voluntarily waived these rights by his guilty plea. In applying these constitutional requirements to the states, the Court would not accept a presumption of an intelligent waiver from a silent record similar to the record in the instant case.

In view of these factors, plus the People's failure to demonstrate any prejudice, we respectfully request this Court to remand the case for the purpose of a hearing before a new

---

* These fundamental constitutional rights have been guaranteed to state defendants in recent Supreme Court decisions - Duncan v. Louisiana, 391 U.S. 145 (1968); Malloy v. Hogan, 378 U.S. 1 (1964); Pointer v. Texas, 380 U.S. 400 (1965); In re Winship, 397 U.S. 358 (1970).

judge. It should be noted that appellant still requests this relief although he has already served a year in jail, has been released on parole, and would be risking a possible return to imprisonment should his plea be withdrawn.

POINT II

THE MOTION TO SUPPRESS EVIDENCE SHOULD HAVE BEEN GRANTED.

Assuming arguendo that the arresting officer in this case had probable cause to stop and arrest appellant based upon the information he had, we submit that the warrantless search of appellant's automobile went beyond the permissible scope of a search incident to a lawful arrest and was, therefore an invasion of appellant's Fourth Amendment rights.

The search and seizure provisions of the Fourth Amendment and the exclusionary rule still require the suppression of evidence obtained as the result of an arrest which the police are otherwise authorized to make, but which is effected by unlawful means. People v. Floyd, 26 N.Y.2d 558, 561 (1970). The Supreme Court has established in Chimel v. California, 395 U.S. 752, 766 (1968) that the lawful arrest of an accused without a warrant permits a search only of his person and the area from which he "might obtain weapons or evidentiary items."

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Ralph McMurry, being duly sworn, deposes and says that he is employed in the office of the Attorney General of the State of New York, attorney for respondent herein. On the 8th day of February, 1977, he served the annexed upon the following named person :

Legal Aid Society
Room 501
U.S. Courthouse
Foley Sq.
NY NY
10007

Attorney in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Ralph McMurry

Sworn to before me this
8th day of February, 1977

David L. Bill
Assistant Attorney General
of the State of New York